

(b) As an employer, you are responsible for ensuring that the service agents you use meet the qualifications set forth in this part (*e.g.*, § 40.121 for MROs). You may require service agents to show you documentation that they meet the requirements of this part (*e.g.*, documentation of MRO qualifications required by § 40.121(e)).

(c) You remain responsible for compliance with all applicable requirements of this part and other DOT drug and alcohol testing regulations, even when you use a service agent. If you violate this part or other DOT drug and alcohol testing regulations because a service agent has not provided services as our rules require, a DOT agency can subject you to sanctions. Your good faith use of a service agent is not a defense in an enforcement action initiated by a DOT agency in which your alleged noncompliance with this part or a DOT agency drug and alcohol regulation may have resulted from the service agent's conduct.

(d) As an employer, you must not permit a service agent to act as your DER.

§ 40.17 Is an employer responsible for obtaining information from its service agents?

Yes, as an employer, you are responsible for obtaining information required by this part from your service agents. This is true whether or not you choose to use a C/TPA as an intermediary in transmitting information to you. For example, suppose an applicant for a safety-sensitive job takes a pre-employment drug test, but there is a significant delay in your receipt of the test result from an MRO or C/TPA. You must not assume that "no news is good news" and permit the applicant to perform safety-sensitive duties before receiving the result. This is a violation of the Department's regulations.

§ 40.19 [Reserved]

§ 40.21 May an employer stand down an employee before the MRO has completed the verification process?

(a) As an employer, you are prohibited from standing employees down, except consistent with a waiver a DOT agency grants under this section.

(b) You may make a request to the concerned DOT agency for a waiver from the prohibition of paragraph (a) of this section. Such a waiver, if granted, permits you to stand an employee down following the MRO's receipt of a laboratory report of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test pertaining to the employee.

(1) For this purpose, the concerned DOT agency is the one whose drug and alcohol testing rules apply to the majority of the covered employees in your organization. The concerned DOT agency uses its applicable procedures for considering requests for waivers.

(2) Before taking action on a waiver request, the concerned DOT agency coordinates with other DOT agencies that regulate the employer's other covered employees.

(3) The concerned DOT agency provides a written response to each employer that petitions for a waiver, setting forth the reasons for the agency's decision on the waiver request.

(c) Your request for a waiver must include, as a minimum, the following elements:

(1) Information about your organization:

(i) Your determination that standing employees down is necessary for safety in your organization and a statement of your basis for it, including any data on safety problems or incidents that could have been prevented if a stand-down procedure had been in place;

(ii) Data showing the number of confirmed laboratory positive, adulterated, and substituted test results for your employees over the two calendar years preceding your waiver request, and the number and percentage of those test results that were verified positive, adulterated, or substituted by the MRO;

(iii) Information about the work situation of the employees subject to stand-down, including a description of the size and organization of the unit(s) in which the employees work, the process through which employees will be informed of the stand-down, whether there is an in-house MRO, and whether your organization has a medical disqualification or stand-down policy for

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employees in situations other than drug and alcohol testing; and

(iv) A statement of which DOT agencies regulate your employees.

(2) Your proposed written company policy concerning stand-down, which must include the following elements:

(i) Your assurance that you will distribute copies of your written policy to all employees that it covers;

(ii) Your means of ensuring that no information about the confirmed positive, adulterated, or substituted test result or the reason for the employee's temporary removal from performance of safety-sensitive functions becomes available, directly or indirectly, to anyone in your organization (or subsequently to another employer) other than the employee, the MRO and the DER;

(iii) Your means of ensuring that all covered employees in a particular job category in your organization are treated the same way with respect to stand-down;

(iv) Your means of ensuring that a covered employee will be subject to stand-down only with respect to the actual performance of safety-sensitive duties;

(v) Your means of ensuring that you will not take any action adversely affecting the employee's pay and benefits pending the completion of the MRO's verification process. This includes continuing to pay the employee during the period of the stand-down in the same way you would have paid him or her had he or she not been stood down;

(vi) Your means of ensuring that the verification process will commence no later than the time an employee is temporarily removed from the performance of safety-sensitive functions and that the period of stand-down for any employee will not exceed five days, unless you are informed in writing by the MRO that a longer period is needed to complete the verification process; and

(vii) Your means of ensuring that, in the event that the MRO verifies the test negative or cancels it—

(A) You return the employee immediately to the performance of safety-sensitive duties;

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(B) The employee suffers no adverse personnel or financial consequences as a result; and

(C) You maintain no individually identifiable record that the employee had a confirmed laboratory positive, adulterated, or substituted test result (*i.e.*, you maintain a record of the test only as a negative or cancelled test).

(d) The Administrator of the concerned DOT agency, or his or her designee, may grant a waiver request only if he or she determines that, in the context of your organization, there is a high probability that the procedures you propose will effectively enhance safety and protect the interests of employees in fairness and confidentiality.

(1) The Administrator, or his or her designee, may impose any conditions he or she deems appropriate on the grant of a waiver.

(2) The Administrator, or his or her designee, may immediately suspend or revoke the waiver if he or she determines that you have failed to protect effectively the interests of employees in fairness and confidentiality, that you have failed to comply with the requirements of this section, or that you have failed to comply with any other conditions the DOT agency has attached to the waiver.

(e) You must not stand employees down in the absence of a waiver, or inconsistent with the terms of your waiver. If you do, you are in violation of this part and DOT agency drug testing regulations, and you are subject to enforcement action by the DOT agency just as you are for other violations of this part and DOT agency rules.

§ 40.23 What actions do employers take after receiving verified test results?

(a) As an employer who receives a verified positive drug test result, you must immediately remove the employee involved from performing safety-sensitive functions. You must take this action upon receiving the initial report of the verified positive test result. Do not wait to receive the written report or the result of a split specimen test.

(b) As an employer who receives a verified adulterated or substituted drug test result, you must consider this